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No. 87-138

IN THE
Supreme Court of the United States
October Term, 1987

VINCENT NICOLOSI, GLEN E. BROWN, PHILIP LOMBARDO and RICHARD DELUCA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO MEMORANDUM IN OPPOSITION

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Respondent contends that:

1. Since petitioners did not sign or verify the purported returns as required by Section 6065 and by Form 1040 itself, or explain or verify their assertion of constitutional privilege citing *Borgeson,* 757 F.2d 1071 (10th Cir., 1985) and

2. Legislative history "makes clear" that the "frivolous return" penalty was meant to apply to returns with *spurious* constitutional objections (underline scored) and

3. Taxpayers cannot refuse to provide any financial informaion at all on a tax return by blanket assertion of the Fifth Amendment privilege.

The Frivolous Return penalty is applicable.

It becomes obvious that a ritualistic mechanical application will almost invariably result in a holding that

financial information required by a tax return is never privileged.

At the United States District Court, Judge Stern specifically recognized that "such men may well have a legitimate Fifth Amendment claim as to their income and deductions" thus contradicting the Respondent's claim (2 above) that the Constitutional objections were spurious.

At the core of this case is the direct conflict between the Fifth Amendment to the Constitution and the Internal Revenue Code. At the outset it must be conceded that the Fifth Amendment privilege is applicable to income tax returns and that a taxpayer's submission or response to a question renders any Constitutional objection waived and moot. Thus to comply with Respondent's contention No. 3 would result in a waiver and the extent of that waiver would be unknown. To explain or verify their assertion of Constitutional privilege on the income tax returns would also be a waiver and its extent unknown.

To sign or verify a document under the penalties of perjury that it is complete, when it is obviously not, would be a criminal violation at the minimum of Code Section 7206(1) i.e., signing a false document.

Essentially this issue is framed by the inevitable polorized concerns for the privacy of the individual as a person and society's expectation of an efficient revenue collection process.

Petitioners herein are in a direct suspect class. It must be conceded that once petitioners' lawyer makes reasonable inquiry into the facts and a reasonable investigation into the law, i.e., direct conflict within the Second Circuit Court of Appeals re *Schiff,* 612 F.2d 73, 83

and *Barnes,* 604 F.2d at 146-148, the two cases being at loggerheads via discrepant consequence of Fifth Amendment claim regarding income tax returns, the claiming of the Fifth Amendment is mandated with regard to earnings whose source cannot be divulged. Otherwise a waiver has occurred and be violative of this Court's admonition pertaining to disclosure contained at n 21 in *Garner,* 424 U.S. 648 (1976).

Sufficient evidence is presented by one if a Court can, by the use of reasonable inference or judicial imagination, conceive a sound basis for a reasonable fear of prosecution. *In re Morganroth,* CA-6, 9/30/83, 34 Cr. L. 2055. Judge Stern recognized petitioners' claims at the District Court level.

Based on the decisions set forth by Respondent and the realities of their legal ramifications, it is presently impossible to claim the Fifth Amendment privilege without:

1. Criminal violation via Code Section 7206(1) i.e., signing a false document that the income tax return is complete.

2. Lose the benefit of the privilege by revealing basis of Constitutional privilege on income tax return despite this Court's admonition in *Garner v. U.S., supra,* that:

(a) Claim of Privilege asserted in good faith bars conviction under Code Section 7203 at n 18.

(b) Courts of Appeals unifcrmly rejecting the notion that a taxpayer may refuse to provide any financial information at all on an income tax return by blanket assertion of a Fifth Amendment privilege contradicts this Court's assertion at n 16 in *Garner, supra,* that in *California v.*

Byers, 402 U.S. 424 (1971) that only one's name and address were required to be disclosed. In addition, although historically the privilege has been interpreted to protect a witness from being compelled to make self-incriminating communications whatever form they might take, *Schmerber v. Calif.,* 385 U.S. 757, 763-764, a procedure has apparently been accepted which circumvents the Constitutionally mandated policy of adversary criminal procedure. See *Garner v. United States, supra.*

3. In direct violation of this Court's mandate in *Spevak v. Klein,* 358 U.S. 511, a penalty is being extracted for claim of the privilege of silence granted by the Constitution of the United States.

Moreover, it was asserted in *Maness v. Myers,* 419 U.S. 449 that a lawyer may not be held in contempt for counseling his client in good faith to assert the Fifth Amendment and refuse to produce Court ordered materials. Based on the aforementioned may costs and attorney's fees be awarded for counselling a client in good faith to assert the Fifth Amendment or would this so restrict the bar from giving such advice, although proper.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: New York, New York
October 30, 1987

Respectfully submitted,

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